83-1383

No.

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THE SUPREME COURT OF THE UNITED STATES

MARK KRIEG

Petitioner

VS.

PAUL REVERE LIFE INSURANCE

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. What portion of the evidence is properly to be considered when a court determines a motion for a judgment not withstanding the verdict pursuant to Rule 50(b) in an Age Discrimination in Employment Act case?

2. Did the lower court so far depart from the accepted and usual course of judicial proceedings in determining the motion for judgment not withstanding the verdict as to require the Supervisory Powers of this Court?

LIST OF PARTIES

The Petitioner is Mark K. Krieg, a former employee of the Respondent.

The Respondent is Paul Revere Life Insurance Company, a subsidiary of Avco Corporation of Greenwich, Connecticut.

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1983

No.

MARK K. KRIEG

Petitioner

vs.

PAUL REVERE LIFE INSURANCE COMPANY

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MARK K. KRIEG respectfully petitions for a writ of certiorari: to review the judgment of the United States Court of Appeals for the Eleventh Circuit in Krieg v. Paul Revere Life Insurance, ____ F.2d _____, entered on November 3, 1983.

OPINIONS BELOW

The opinion of the district court is unpublished and is reported as Appendix A to this Petition. The opinion of the court

of appeals is reported at _____F. 2d _____, entered on November 3, 1983. It is reprinted as Appendix 2.

JURISDICTION

The court of appeals issued its decision on November 3, 1983. This petition was filed within 90 days of the later. This Court has jurisdiction to review the judgment below under 28 U.S.C. §1254(1).

STATUTES AND RULE INVOLVED

The Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 et seq. (hereinafter ADEA) prohibits employers from discriminating against employees on the basis of age.

Fed.R.Civ.Proc. 52(b) provides for a Motion for Judgment Notwithstanding the Verdict as follows:

> Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is

deemed to have submitted the action to the jury subject to later determination of the legal questions raised by the motion...If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed...

STATEMENT OF THE CASE

A. Factual Background

Petitioner Mark K. Krieg brought suit against Paul Revere Life Insurance Company, alleging that his discharge as general manager of the Company's Charlotte, North Carolina agency was in violation of the ADEA.

Mr. Krieg had worked successfully for the Company for over 26 years. By 1969, he was a regional sales vice-president. In November, 1974, he stepped down to become general manager in Charlotte. In effect, as the then regional sales vice-president, he appointed himself to his new position. As part of this personnel re-organization, one of his former employees, Robert Bates, a younger individual, who had shortly before expressed dissatisfication with the company, became regional sales vice-president. In essence, Bates became Krieg's boss. In

September, 1976, the company terminated Krieg and replaced him with a 27 year old man.

At the time of the termination, Krieg had expressed some dissatisfaction with the Company's policies. Further, he had expressed concern about the effect of job related stress to his health. On the Company's part there was some concern as to the development of agency personnel and that Krieg's guaranteed salary was becoming known around the region. Krieg expressed interest in retiring at a guaranteed salary which had to his knowledge been offered in the past to retiring personnel. His desire was conveyed to Bates by letter. Bates in turn forwarded this letter to the home office expressing approval and stating his own desire "to get Krieg out of the region as soon as possible."

A written offer was prepared for Krieg which would permit Krieg a salary if he

remained with the company in a sales position and personally produced $400 paid premiums per month. This offer was conveyed to Krieg in person. The written offer was not presented. During that meeting Krieg made comments about the Company which Bates and the home office person testified they interpreted as direct threats. By the end of the meeting Krieg was given the option of resigning or being terminated. Although Krieg tried to obtain a copy of the written offer it was not presented to him. Instead, he received a formal termination notice.

B. The District Court's Opinion

The cause was tried before a jury in in September, 1981. By answers to special interrogatories the jury found for the Plaintiff, awarding damages in the amount of $137,832. The district court, by Order

dated March 2, 1982, granted Defendant's timely filed motion for a judgment not withstanding the verdict (hereinafter j.n.o.v.) pursuant to Rule 50.

1. The Petitioner Established a Prima Facie Case:

The district court correctly recited the prima facie elements of an ADEA claim, namely: (1) membership in the protected class [40-75]; (2) discharge; (3) qualifications for the position; and (4) replacement by one outside the protected class. For this reason the district court denied Defendant's motion for directed verdict at the close of the Plaintiff's case in chief.

2. The Defendant's articulated reasons for the discharge:

The district court then recited the Defendant's "articulated reason [sic] for Plaintiff's termination." They were: Plaintiff's expressed desire to step down as

General Manager; Plaintiff's criticism of Defendant's method of operation; and Plaintiff's unwillingness "to accept any alternative employment arrangement which contained any minimum production requirements...." It is noted here that the district court footnoted this statement as follows: "Although there was some disagreement as to the words actually used, the Plaintiff's account of his terminal interview with the Defendant's representatives substantially agreed with these conclusory descriptions of the circumstances which brought about his termination." (Page 2, Appendix 1.)

3. The standard for a j.n.o.v.:

The district court, relying on Boeing Co. v. Shipman, 411 F. 2d 365 (5th Cir. 1969) (en banc), which it correctly saw as applied to ADEA cases, granted Defendant's timely motion for j.n.o.v. In its opinion

the district court also correctly recited the proper allocation of burden of proof and burden of going forward with the evidence, as established by Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981), which applies to ADEA cases. Haring v. CPC International, Inc. 665 F. 2d 1234 (5th Cir. 1981).

The district court then held that the Plaintiff's evidence consisted of nothing more than a McDonnell Douglas prima facie case, finding that there was no evidence, direct or circumstantial, from which it could be concluded, "even by inference, that the Defendant's articulated reasons for the Plaintiff's termination were pretextual in nature. The clear and manifest weight of the evidence was that the Plaintiff was dismissed because of his displeasure with the company in general, his unwillingness to continue in his position as a general

manager, and his unwillingness to accept any offer of settlement containing minimum production requirements." (page 3, Appendix 1.)

B. The Decision of the Eleventh Circuit Court of Appeals:

The Court of Appeals in a per curium opinion recited the j.n.o.v. standard as set forth in Boeing, supra. It also recited the elements of a prima facie case and the allocation of burdens of proof and production as set forth in numerous Fifth Circuit cases.

Most curiously, the Court of Appeals then recited the "events" leading up to the Petitioner's termination from employment. In this recitation of the "events" the Court Appeals drew from evidence presented by both parties, which required recitation of oral as well as documentary evidence.

After this review the majority opinion

correctly stated the rule that once a defendant offers evidence of legitimate non-discriminatory reasons for termination the plaintiff has the burden of showing those reasons to have been a pretext for discrimination. It then further correctly stated that: "[w]ithout a presumption, the question becomes whether the plaintiff's proof constituted evidence substantial enough to raise an inference of discrimination." (Page 359, Appendix 2.) The majority then reviewed the evidence and appears to have reached certain factual conclusions based on this evidence. Indeed, as the dissent points out, the majority drew its own inferences from the evidence.

The per curium decision was dissented from by the Judge Kravitch, who opined that the majority fails to explain why "the evidence offered by Krieg does not 'negate' defendant's proffered reasons but fails to

address why 'reasonable' persons could not conclude that discrimination was the more likely motive." (page 361, Appendix 2) The dissenting judge concluded that if she had been a juror in this case she might have

> "concluded that Krieg was terminated because he was causing trouble and was unable to produce adequately. There is substantial evidence however that the company used Krieg's criticisms and anger as a way to push him, an employee in the protected age category making a relatively large salary, out of the way for younger, less expensive employees. I cannot join the majority's determination that this was not a reasonable conclusion. Our role is not to second-guess the jury's evaluation as long as 'reasonable' persons could differ. This is admittedly a close case, which is precisely the reason the jury's verdict must be respected if the

evidence permits an inference of discrimination."

Id., 362.

REASONS FOR GRANTING THE WRIT

A. Introduction: Conflict in the Circuits and Supervisory Power of this Court:

This ADEA case is a prime example of the necessity for a definite decision of this Court regarding which evidence is to be reviewed by a court in determining a motion for a j.n.o.v. entertained pursuant to Rule 50(b). The evidence reviewed by the district and circuit court in the instant case is different from that which other circuit examine in reaching a determination such a motion. There are two other views applied by different circuits. The

determination which evidence to review has special importance in ADEA cases in light of the use of inferences and the articulation of the burden of production in these cases (recognized in similiar cases under Title VII (42 U.S.C. §2000e) in accordance with the teachings of this Court in Burdine, supra. Burdine and other cases recognize the importance of the use of inferences and cross-examination in these types of cases to establish the pretextual nature of the employer's justification for the adverse employment action taken. The rule applied in the instant case also conflicts with the rule as articulated by this Court in Wilkerson v. McCarthy, 336 U.S. 53 (1949).

Further, both the lower courts "so far departed from the accepted and usual course of judicial proceedings" to require the supervisory power of this court. See Sup.Ct. Rule 17.1(a).

B. Evidence Considered in Determining a Motion for a J.N.O.V.

1. Introduction:

It has generally been recognized that three distinct standards have been applied to judgments n.o.v.[1] These are that the court must consider: (1) all the evidence presented in a manner most favorable to the non-moving party [or verdict winner]; (2) only that evidence which supports the verdict winner; or (3) uncontradicted, unimpeached evidence from disinterested witnesses. See, Schwimmer v. National Fuel Gas Distribution Corp., ___U.S. _____, 103 S.Ct. 362, (1982) (J. White, dissenting). See also, 9 Wright and Miller, Fed.Prac.&

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[1] It is noted here that there is some difficulty in completely analyizing the different circuits viewpoints, since frequently the decisions slip away from a precise articulation of which portion of the evidence a court is considering in determining the issue.

Proc. §2529 (1971) and Cooper, "Directions for Directed Verdicts: A Compass for Federal Courts," 55, Minn.L.Rev., 903 (1970-1971).

(2) All the evidence:

The Second, Fourth, Fifth, Seventh, Ninth, Tenth, Eleventh, and D.C. Circuits all appear to consider all the evidence presented in determining the motion. However, all these cases must be read with great care since few on point precisely explain which evidence they are reviewing. The Second Circuit applied this rule in Schwimmer v. Sony Corp., 677 F.2d 946 (2nd Cir. 1982), cert. denied, 103 S.Ct. 362 (1983) (White, J., dissenting). Justice White reads Schwimmer to mean that the Second Circuit, in ruling on directed verdicts and judgments n.o.v., will examine all of the evidence.

In Schwimmer, the Second Circuit reversed the district court's entry of a jury verdict in favor of plaintiffs in an anti-trust action. In doing so, the Schwimmer court held:

> If, however, after viewing all of the evidence most favorably to plaintiff, we cannot say that the jury could reasonably have returned the verdict in his favor, our duty is to reverse the judgment below.

Id. at 952.

The Fourth Circuit agrees. See Lovelace v. Sherwin-Williams Co., 681 F.2d 230 n. 14 (4th Cir. 1982) (citations omitted).

The Fifth Circuit's view is set out in Boeing, supra, at 374:

> The Court should consider all of the evidence...in the light and with all reasonable inferences most favorable to the party opposed to the motion. If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court

believes that reasonable men could not arrive at a contrary verdict granting of the motion [emphasis supplied] is proper.

Boeing also stated:

> On the other hand, if there is substantial evidence opposed to the motions, that is, evidence of such quality and weight that reasonable and fair minded men in the exercise of impartial judgment might reach different conclusions, the motions should be denied, and the case submitted to the jury...The motions for directed verdict and judgment n.o.v. should not be decided by which side has the better case, nor should they be granted only when there is a complete absence of probative facts to support a jury verdict. There must be a conflict in substantial evidence to create a jury question. However, it is the function of the jury as the traditional finder of facts, and not the

> Court, to weigh conflicting evidence and inferences, and determine the credibility of witnesses.

[Emphasis supplied] The Sixth Circuit's view is also closely aligned with these views. See National Polymere Products, Inc., v. Borg-Warner Corp., 660 F.2d 171, (6th Cir. 1981).

This standard has been applied by the Sixth Circuit in an ADEA case, Morelock v. NCR Corp., 586 F.2d 1096 (6th Cir. 1978), cert. denied, 441 U.S. 906 (1979), and most recently in Hill v. Spiegel, Inc., 708 F.2d 233 (6th Cir. 1983). See also Pike v. Benchmaster Manufacturing Co., 696 F.2d 38, 40 (6th Cir. 1982) (reciting history of Sixth Circuit "stringent standard for granting judgments n.o.v." and involves the reversal of a j.n.o.v. on a strict liability

action); and Hildebrand v. Board of Trustees of Michigan State University, 662 F.2d 439 (6th Cir. 1981) (affirming a j.n.o.v. granted where plaintiff challenged his denial of tenure).

This standard is also employed by the Seventh Circuit. In McClure v. Cywinski, 686 F.2d 541 (7th Cir. 1982), the court stated that "an appeal from a judgment n.o.v. requires us to consider all facts in opposing the motion...." Id. at 543. The McClure court also noted that a jury verdict must be allowed to stand if it is supported by circumstantial evidence, but that a j.n.o.v. was proper if the verdict was supported only by "sheer speculation and conjectures." [Emphasis Supplied].

The Ninth Circuit also employs this same standard and looks at the same evidence in reaching its determination. In California Computer Products, Inc. v. IBM,

613 F.2d 727 (9th Cir. 1979), a manufacturer brought an anti-trust action against another manufacturer. The district court directed a verdict in favor of the defendant. The Ninth Circuit affirmed the granting of the directed verdict and stated:

> The district court must consider all the evidence -- both favorable and unfavorable. But in order to avoid passing on the credibility of witnesses and weighing contradictory evidence, the court must resolve all inferences in favor of the party with the burden of persuasion....

[Emphasis supplied.] Id. at 733.

The Tenth Circuit also follows this view. A recent case, Taylor v. Gilmartin, 686 F.2d 1346 (10th Cir. 1982), cert. denied, 103 S.Ct. 788 (1983), reviewed all the evidence before the trial court.

The Boeing standard has been adopted by the Eleventh Circuit and utilized in Neff v. Kehoe, 708 F.2d 639 (11th Cir. 1983).

The Eleventh Circuit view was also articulated in Krieg, supra., as well as somewhat earlier in Panter v. Marshall Field Co., 646 F.2d 271, (11th Cir. 1981).

This is also the view of the District of Columbia Circuit. See, Vander Zee v. Karabatsos, 589 F.2d 723 (D.C. Cir. 1978), cert. denied, 441 U.S. 962 (1979) and Boutros v. Riggs National Bank, 655 F.2d 1257 (D.C. Cir. 1981).

This standard was recently applied in an employment discrimination case in Metrocare v. Washington Metropolitan Area Transit Authority, 679 F.2d 922 (D.C. Cir. 1982) (affirmed the trial court's granting of the motion.)

(3) Only that evidence which supports the verdict of the winner:

The Eight Circuit appears to stand alone in its view of which evidence to consider. Justice White's Schwimmer dissent

cites Simpson v. Skelly Oil Co., 371 F.2d 563 (8th Cir. 1967), for the proposition that only the evidence of the verdict winner will be considered by the Eighth Circuit. In Simpson, the district court entered a j.n.o.v. for the defendant against the verdict winning plaintiff. The Eighth Circuit reversed, ruling that when a judge is considering a j.n.o.v., "it is his duty to accept the plaintiff's version as true for the purpose of the motion, notwithstanding the existence of strong testimony to the contrary...." Id. at 567.

More recently, the Eighth Circuit reiterated this rule in Dace v. ACF Industries, Inc., ___F. 2d.___, 33 FEP 788 (8th Cir. 1983), an ADEA case.The Circuit reversed the trial court's granting of the defendant's motion for a directed verdict and held: "[O]ur precedents predominantly support the general proposition that only

the evidence favoring the nonmoving party (usually as here, the plaintiff) should be considered." Id., at 790. The Eight Circuit in Dace relied on this Court's decision in Wilkerson, supra. for this holding.

(4) Uncontradicted, unimpeached evidence from disinterested witnesses:

Justice White, dissenting in the denial of the petition for certiorari in Schwimmer, cites the Third Circuit's Inventive Music Ltd. v. Cohen, 617 F.2d 29 (3rd Cir. 1980) as support for his understanding that it is one of two circuits which apply a "middle-ground" standard for viewing evidence when ruling on directed verdicts and judgments n.o.v. Justice White articulated the standard he believed the First and Third Circuits apply: "[T]he reviewing court may consider uncontradicted, unimpeached evidence from disinterested witnesses." 103 S.Ct. at 364.

In Layne v. Vinzant, 657 F. 2d 468 (1st Cir. 1981) this was articulated as follows: the evidence should be viewed in the light most favorable to the plaintiff, but that uncontradicted evidence presented by the defendant will be considered "to a degree." Id., 472. This has particular effect when documentary evidence is to present. Id.

In Inventive Music, supra., however, the court does not clearly articulate this standard. Rather, the Third Circuit held that a directed verdict in favor of the defendant was proper because there was uncontradicted, credible, and unimpeached evidence supporting defendant's theory of the case. This finding by the Third Circuit that the directed verdict was appropriate is closer to the reasoning of Pence v. United States, 316 U.S. 332 (1942) than to an articulation of what evidence may be

considered. Pence held that the directed verdict was proper because it was based upon the uncontradicted and unimpeached evidence of the defendant. Neither Pence nor Inventive Music discuss whether this is the only source of evidence to be considered.

It is also important to note that the Third Circuit distinguishes between moving parties who have the burden of persuasion and moving parties who do not have the burden of persuasion. In Fireman's Fund Insurance Co. v. Videfreeze Co., 540 F.2d 1171 (3rd Cir. 1976), the court seemed to be using all of the evidence in judging the appropriateness of the j.n.o.v., but it delineated the varying amounts of evidence necessary for a j.n.o.v. depending on whether the party had the burden of persuasion:

> [T]hough a motion for directed verdict in favor of the proponent of an issue is cast in the same form as when made by the defending party, it requires the judge to test the body of the evidence not for its insufficiency to support a finding, but rather for its overwhelming effect. He must be able to say not only that there is sufficient evidence to support the finding, but additionally that there is insufficient evidence for permitting any different finding.

Id. at 1177 quoting Mihalchak v. American Dredging Co., 266 F.2d 875, 877 (3rd Cir.), cert. denied, 361 U.S. 901 (1959).

The Third Circuit in Massarsky v. General Motors, 706 F.2d. 111 (3rd Cir. 1983), cert. denied, 52 USLW 3342 (1983), relied on the reasoning of Fireman's Fund in denying a plaintiff's motion for a j.n.o.v. Plaintiff in Massarsky sued General Motors alleging a claim ADEA. Based upon the jury's answers to special interrogatories, the district court entered judgment in favor of the defendant and then denied plaintiff's

motion for a j.n.o.v. and new trial. The Massarsky court, in reviewing and affirming the denial of the j.n.o.v., did not specifically list the type of evidence it considered; it spoke of "the body of the evidence." In addition, the Massarsky court did not draw the same distinction between the movant having or not having the burden of persuasion when it held:

> These motions require the judge to test the body of the evidence, not for its insufficiency to support a finding, but rather for its overwhelming effect."

706 F.2d at 119. However, the movant in Massarsky was the party with the burden of persuasion, and the court may not have deemed it necessary to articulate the distinction.

D. The Necessity of Resolving the Conflict:

The confusion as to which evidence should be viewed is of particular importance in ADEA cases. The problem has been most recently addressed in and illustrated by the Eight Circuit's opinion in Dace, supra. There the trial court had directed a verdict against the plaintiff at the close of the evidence.[2]

The Dace opinion reviews the different views of which evidence should be examined in reaching a determination on the issue and analysis the evidence in accordance with the requirements of the shifting burdens of production as required by Burdine. In footnote 7 Dace articulates the heart of the issue here:

> It might be argued that since Dace has made out a prima facie case, he automatically is entitled to reach the jury. Specifically, one might argue that since the prima facie case is enough to reach the jury at

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[2]The same principles are applicable to both directed verdicts and j.n.o.v. Dace, at 790.

the close of the plaintiff's case, there is no reason why it should not be equally so at the close of the defendant's case, as none of the defendant's unfavorable evidence may be considered. In response it can be argued that in age discrimination cases the requirements for a prima facie case are artificial, in the sense that they are imposed only to provide for the orderly development of evidence, rather than to establish the elements of a successful case. Without directly addressing this issue, several courts of appeals have allowed the grant of a motion for directed verdict or judgment n.o.v. in cases where the plaintiff has proved a prima facie case of age discrimination. Boherer v. Hanes Corp., 715 F. 2d 313 (5th Cir. 1983) [additional citations omitted](The Fifth Circuit cases can perhaps be explained by the fact that the Fifth Circuit allows consideration of unfavorable evidence on a motion for directed verdict. [citation omitted] Although the Supreme Court has recently taken the view that the inference of discrimination in Title VII cases created when the plaintiff makes a prima facie case drops from the case when the defendant offers

> proof of nondiscriminatory motives. United States Postal Service v. Aikens, 460 U.S. ____, 103 S.Ct. 1478 (1983), these suits differ from age-discrimination suits in that the former are not tried to a jury, whereas the latter are.

Id., 791.

The Dace court did not need to resolve the issue because of the procedural posture of the case. However, it does illustrate the problem, which is of particular importance in the instant case as well as in other ADEA actions. It is now well accepted that the presumption of discrimination drops from a Title VII or ADEA case after the defendant articulates the reasons for the adverse employment action. However, what is still not clear is what evidence is

substantial enough to bar a j.n.o.v.. A plaintiff may show the pretextual nature of the proffered reasons by effective cross-examination of the defendant's witnesses. This observation was made by the Burdine court in footnote 10, as follows:

> In saying that the presumption drops from the case, we do not imply that the trier of fact no longer may consider evidence previously introduced by the plaintiff to establish a prima facie case. A satisfactory explanation by the defendant destroys the legally mandatory inference of discrimination arising from the plaintiff's initial evidence. Nonetheless, this evidence and inferences properly drawn therefrom may be considered by the trier of fact on the issue of whether the defendant's explanation is pretextual. Indeed, there may be some cases where the plaintiff's initial evidence, combined with effective cross-examination of the defendant, will suffice to discredit the defendant's explanation.

[Emphasis supplied] Id., 101 S.Ct. 1095.

This same possibility of destroying the credibility of the defendant's reasons has been recognized by other courts deciding motions for a judgment n.o.v. under the ADEA. See e.g. Boherer, supra., and Reeves v. General Foods Corp, 682 F.2d 515 (5th Cir. 1982) (evidence of satisfactory performance was such that jury could have decided that articulated explanation of poor performance was unworthy of credence).

The importance of how to maintain the inferences of discrimination established by the prima facie case is troublesome. If the evidence which establishes the elements can be combined with effective cross-examination of the defendant's witnesses, then these factors would appear to be sufficient to permit the fact-finder to determine the issue. Thus, a case would only be permitted to be taken from the verdict winner when "no rational jury could

find against the moving party on the evidence so viewed." Dace, 790. Or, as articulated by Judge Kravitch in her dissent to the instant case, the court may not substitute its judgment for that of the jury. However, if the evidence to be reviewed is determined by who bears the burden, a different result may occur. Similarly, another result may occur if all the evidence is to be considered. And, finally still another may be the case if only the uncontradicted, unimpeached evidence is at stake.

Therefore, it becomes crucial that this Court clarify which evidence should be considered in determining the j.n.o.v. and how the courts are to determine whether sufficient evidence is of record to reveal the pretextual nature of the proffered reasons. The courts are increasingly faced with motions requesting

both directed verdicts and judgments n.o.v. Only this Court can give the lower courts the guidance it needs in reaching determinations on this issue which is crucial to ADEA litigants.[3]

E. The Lower Courts So Far Departed From Their Own Established Rules as to Require the Supervisory Power of this Court:

Petitioner respectfully submits that there is an additional and/or alternative reason for the granting of the writ. Both the district and circuit courts correctly recited the controlling standard within the Eleventh Circuit. Yet both deviated greatly from that standard and substituted their judgments for that of the jury.

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[3] In addition to the cases cited within the body of this Petition the following are a sampling of other ADEA cases which have faced this issue: Halgethorn v. Kennecott, 710 F. 2d 76 (2nd Cir. 1983); Rose v. NCR Corp, 703 F. 2d 225 (6th Cir. 1983), cert. denied, 52 USLW 3342 (1983); Criswell v. Western Airlines, 709 F. 2d 544 (9th Cir. 1982); Coburn v. Pan American World Airways, Inc., 711 F. 2d 339 (D.C. Cir. 1982), cert. denied, 52 USLW 3422 (1983).

The district court's opinion, as set forth above acknowledges (footnote on page 2, Appendix 1) that there was some disagreement as to the words used in the termination interview. Yet the Court concluded that there was a substantial agreement between the parties as to what occured. Further, the district court concluded that there was no evidence, either direct or circumstantial upon which even by inference, it could be determined that the Defendant's articulated reasons for the Plaintiff's termination were pretextual. Thus, the court ignored the effect of cross-examination on the credibility of the defendant's witnesses, which was solely for the jury to determine.

Further, the Court of Appeals acted as the fact-finder in derogation of the statutory right to a trial by jury in these cases. Indeed, it appears that the

panel took all inferences against the Petitioner instead of for him, as required by Boeing. As the Dace court observed:

> "Occasionally verdicts may be returned with which judges strongly disagree. This is a price, we think, worth paying for the jury system, which is enshrined in the Bill of Rights and sanctified by centuries of history. When questions of fact are involved, common sense is usually more important than technical knowledge and twelve heads are better than one.

Id., 790.

For these reasons the Petitioner requests that this Court exercise its supervisory power to correct the judgment below.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted by this Court.

Respectfully submitted,

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Counsel for Petitioner

PROOF OF SERVICE

I HEREBY CERTIFY that on this 1st day of February, 1984, three copies of the Petition for Writ of Certiorari in the case of MARK KRIEG v. PAUL REVERE LIFE INSURANCE were mailed, first - class postage prepaid to: DON A. BANTA, NAPHIN, BANTA, & COX, 55 West Monroe Street, Chicago, Illinois 60603, Counsel for Respondent. I further certify that all parties required to be served have been served.

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Mark K. Krieg

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

MARK K. KRIEG,	:	
	:	
Plaintiff	:	
	:	
vs.	:	
	:	CASE NO.
PAUL REVERE LIFE INSURANCE COMPANY,	:	78-54-Civ-FtM-H
	:	
Defendant.	:	

ORDER

This is an action brought by the Plaintiff, Mark K. Krieg, against the Defendant, Paul Revere Life Insurance Company, under the Age Discrimination in Employment Act (ADEA), 29 USC §621, et seq. The case was tried before a jury in Fort Myers during the period of September 16-18, 1981. By its answers to special interrogatories, the jury found in favor of the Plaintiff and awarded damages in the amount of $137,832.

The Defendant has filed a motion for judgment notwithstanding the verdict, or for a new trial, pursuant ot Rule 50(b), F.R. Civ. P. The issues presented were fully

argued by counsel at the trial, and have sine been briefed by both sides in relation to the pending motion. In Houser v. Sears, Roebuck & Co., 627 F.2d 756, 757 (5th Cir. 1980), the Court held:

> In McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 93 S.Ct. 1817, 1824, 36 L.Ed.2d 668 (1973), the Supreme Court set forth the criteria necessary to establish a prima facie case of employment discrimination. This court has adopted with modifications the McDonnell Douglas test for age discrimination in employment. McCorstin v. United States Steel Corp., 621 F.2d 749 (5th Cir. 1980); Price v. Maryland Casualty Co., 561 F. 2d 609, 612 (5th Cir. 1977); Marshall v. Goodyear Tire & Rubber Co., 554 F.2d 730, 735 (5th Cir. 1977). To establish a prima facie case of age discrimination, the Plaintiff must prove: (1) his membership in the protected class, (2) his discharge, (3) his qualifications for the position, and (4) his replacement by one outside the protected class.

Accordingly, at the trial of this case,

the Court denied the Defendant's motion for directed verdict made at the close of Plaintiff's case in chief, finding that the Plaintiff had established a McDonnell Douglas prima facie case, and the Defendant was required to go forward with the presentation of evidence.

The Defendant's articulated reason for Plaintiff's termination was that the Plaintiff himself had expressed a desire to step down from his position as General Manager of the Defenant's office at Charlotte, North Carolina (See Defendant's Exhibit K); that the Plaintiff was particularly critical of the Defendant's method of operation; and that the Plaintiff was unwilling to accept any alternative employment arrangement which contained any minimum production requirements (See

Defendant's exhibit L).* Accordingly, the Plaintiff was offered the choice of resigning or being terminated (See Defendant's Exhibit M).

The proper standard to be applied in passing upon a motion for the entry of a judgment notwithstandig a verdict was established by the Court in Boeing Co. v. Shipman, 411 F. 2d 365 (5th Cir. 1969) (en banc), and that standard applies with equal force in ADEA cases. Houser v. Sears, Roebuck & Co., supra. The test is whether the facts and inferences point so strongly and overwhelmingly in favor of the moving party that reasonable persons could not arrive at a contrary verdict. If so,

*Although there was some disagreement as to the words actually used, the Plaintiff's account of his terminal interview with the Defendant's representatives substantially agreed with these conclusory descriptions of the circumstances which brought about his termination.

the motion should be granted.

In Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S.Ct. 1089 (1981), the Court clarified its decision in McDonnell Douglas and explained that the McDonnell Douglas test for a prima facie case applies only in determining the burden of going forward with the evidence at trial; it does not affect the burden of proof or the burden of persuasion which remains upon the Plaintiff. See Haring v. CPC International, Inc., 665 F.2d 1234, 1238 (5th Cir. 1981).

In this instance the Plaintiff's evidence consists of nothing more than a McDonnell Douglas prima facie case. There was no evidence, direct or circumstantial, from which it could be concluded, even by inference, that the Defendant's articulated reasons for the Plaintiff's termination were pretextual in nature. The clear and

manifest weight of the evidence was that the Plaintiff was dismissed because of his displeasure with the company in general, his unwillingness to continue in his position as a general manager, and his unwillingness to accept any offer of settlement containing minimum production requirements.

Accordingly, applying McDonnell Douglas (as qualified in Burdine) together with Boeing Co. v. Shipman, it is my conclusion that the facts and inferences point so strongly and overwhelmingly in favor of the Defendant that reasonable persons, applying the appliable law, could not arrive at a contrary verdict. It follows that the Defendant's motion for the entry ofjudgment notwithstanding the verdict should be, and is hereby, GRANTED. The Clerk is directed to enter judgment for the Defendant. See Jackson v. City of Killeen, 654 F.2d 1181 (5th Cir.1981).

Pursuant to Rule 50(c)(1), F.R. Civ. P., in the event the judgment entered in consequence of this order is hereafter vacated or reversed, the Defendant's motion for a new trial would be granted for the same reasons previously mentioned.

IT IS SO ORDERED.

DONE AND ORDERED at Tampa, Florida, this 2nd day of March, 1982

WILLIAM TERRELL HODGES
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No.82-5439

ORAL ARGUMENT CALENDAR 11/3/83

MARK K. KRIEG, Plaintiff/Appellant,

v.

PAUL REVERE LIFE INSURANCE COMPANY, Defendant/Appellee

Appeal From the United States District for the Middle District of Florida

Before Roney & Kravitch, Circuit Judges and Tuttle, Senior Circuit Judge

PER CURIUM:

The sole issue in this age discrimination case is whether the evidence at trial was sufficient to require reversal of the district court's judgment for defendant notwithstanding a $137,832 jury verdict. Holding the evidence was insufficient to support the jury verdict, we affirm.

We review the trial court's granting of a judgment n.o.v. under the same standard as the district court applies in the first instance.

> [T]he Court should consider all of the evidence...in the light and with all reasonable inferences most favorable to the party opposed to the motion. If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting of the motion[] is proper.

Boeing Co. v. Shipman, 41 F.2d 365, 374 (5th Cir. 1969) (en banc).

Plaintiff brought this suit under the Age Discrimination in Employment Act 29 U.S.C.A. §621 et seq. There is no dispute that he established a prima facie case of age discrimination by proving: (1) his membership in the protected class; (2) his discharge; (3) his qualification for the position; and (4) his replacement by one outside the protected class. Marshall v. Goodyear Tire & Rubber Co., 554 F.2d 730, 735 (5th Cir. 1977) (adopting for ADEA suits the criteria established for Title VII cases in McDonnel Douglas Corp. v. Green, 411 U.S. 792, 802, 934 S.Ct. 1817, 1924, 36

L.Ed.2d 668 (1973)). The defendant then introduced evidence articulating reasonable factors other than age for the discharge. Marshall v. Westinghouse Electric Corp., 576 F.2d 588, 590-92 (5th Cir. 1978). It was then incumbent on the Plaintiff to prove that the employer's proffered reasons for the discharge were but a pretext. Smith v. Farah Manufacturing Co., Inc., 650 F.2d 64, 68 (5th Cir. 1981). As the Court observed in Smith, when the parties have developed their full proof it is unnecessary to analyze the evidence according to "the ebb and flow of shifting burdens" of proof under McDonnell Douglas. Id. at 68. At that point, the trier of fact must determine whether plaintiff has met the ultimate burden of showing the employer intentionally discriminated against him in violation of the ADEA.

Mark Krieg successfully worked for Paul Revere Life Insurance Company for some 26

years. He moved up in the company, becoming a regional sales vice president in 1969. In November 1974 Krieg stepped down to assume the position as general manager of the company's agency in Charlotte, North Carolina, in effect appointing himself to that position pursuant to his authority as vice president. Two years after he became general manager, the company terminated Krieg and replaced him with a 27 year old man. Because he was qualified for the job and was within the protected age group, being 58 years old, those facts proved a prima facie case. A brief review of the events leading to Krieg's termination demonstrates why defendant was entitled to judgment.

During the course of Krieg's career, the company recognized his success both as a sales person and as a manager. He introduced several letters from his

superiors, two of which he received shortly before his termination, lauding his accomplishments in a variety of areas.

On August 27, 1976, however, Robert Bates, the person who replaced Krieg as sales vice president, met with Krieg and voiced several concerns about Krieg's performance as general manager: the first was a decline in the agency's business, the second dealt with problems relating to the development of management trainees, and the third was knowledge and the apparent jealousy of other managers about the amount of Krieg's guaranteed salary. Krieg indicated he could "no longer do this job" because of the stress involved and that he would be willing to retire from the general manager's position if he could continue with the company as an agent writing personal business. He requested that the company guarantee a salary of $25,000.00 a year for

four years, at which time he would be 62 years old and eligible for social security benefits. Bates told Krieg "that it certainly was not healthy to have a man in the job who did not have his heart in it ...." In a letter to Bates dated August 31, Krieg proposed the terms of an agreement that would allow him to leave the general manager's position. The letter stated Krieg's desire to reach an agreement without delay because "once a decision is made to leave, the quicker the better." Bates forwarded copies of his memorandum concerning the August 27 meeting and Krieg's letter to Ralph Stoughton, the company's vice president for sales. In a cover letter, Bates stated his desire "to get Krieg out of the region as soon as possible." He focused his wishes on Krieg's failure to develop two management trainees, stating that Krieg was "doing very

little...and [would] continue to do little." Bates observed that paying Krieg $25,000.00 a year for four years "doesn't sound all that bad to me to get him out of the way" since the company would have to pay Krieg $100,000, based on his $50,000.00 a year guarantee as general manager, if he worked to age 60 as he originally had planned. The cover letter stated that while Krieg could have been a "very positive influence" on both the region and the company as general manager, he had instead been a "negative influence and a thorn in the side. On that basis, I certainly do not want to pass up this opportunity to get him out as soon as possible."

At Stoughton's direction, the company's secretary prepared a written offer for presentation by Bates and Stoughton to Krieg at a meeting on September 23, 1976. Stoughton opened the meeting by asking Krieg

why he wanted to step down as a general manager. Kreig outlined in great detail his inability to continue working the long hours required by the genral manager's position and criticized the company, its product, and methods of operation. Krieg stated he had offers from other companies, that he "knew his way around the Southern Region and would make it difficult" for the company, and finally that, while he did not want to, he would compete against the company. Stoughton and Bates interpreted these remarks as a direct threat.

Despite Krieg's criticism, Stoughton proceeded to described the terms under which Krieg could remain with the company while writing personal business. The offer included a personal production quota of $400.00 a month. There was evidence that it would take four or five sales a month to meet this requirment. Krieg told Stroughton

the $400.00 monthly production requirement was unacceptable and that he would prefer to stay on as general manager. Stoughton then said that option was no longer available. By the end of the meeting, it became clear Krieg had the option of either resigning or being terminated. Krieg later contacted Bates indicating that he would like to see the written offer to determine whether it might be acceptable after all. Bates replied that Stoughton had taken the letter. Stoughton then wrote Krieg a letter dated October 1, 1976, which stated:

> At your request, we held a meeting in Charlotte on September 23, 1976. At this meeting, you informed Bob Bates and myself that you no longer wish to function as a General Manager. You also were very specific in that no production requirements would be acceptable to you under any plan we might wish to propose.
>
> At the conclusion of our

> meeting, you stated that you wanted to decide whether it would be best to resign or simply have Paul Revere terminate your contracts. You also agreed that you would reach your decision by October 1, 1976.
>
> Enclosed you will find your formal termination letter, the Company will accept your resignation dated October 1, 1976, if this your preference.

Krieg never responded, and the company filled his position with a 27 year old man.

There was no substantial dispute about these facts. After jury returned a verdict for Krieg, Paul Revere argued there was no evidence to support a finding that it

discharged Krieg because of his age. It contended that it was only after Krieg had stated his unwillingness to continue performing his duties as general manager, expressed his low regard for the company, and refused to accept the production requirement that the company legitimately responded by saying "resign or be fired." The district court agreed and entered a judgment n.o.v.

Because the defendant offered evidence of its legitimate reasons for firing Krieg, any presumption of discrimination arising out of the prima facie case "drops from the case." Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 254-55 & n.10, 101 S.Ct. 1089, 1094-95 & n.10, 67 L.Ed.2d 207 (1981). Without a presumption, the question becomes whether the plaintiff's proof constituted evidence substantial enough to raise an inference of

discrimination. In this case, the issue is whether there is sufficient evidence to support the jury's verdict that plaintiff carried the burden of showing that the company's proffered reasons for the discharge were merely a pretext for firing Krieg because of his age.

Krieg raises three points in arguing the company's proffered reasons were a pretext. First, he asserts the company treated him differently from younger general managers who voiced complaints about the company. He relies on an incident involving Bates, who at one point served as general manager of th Roanoke, Virginia office and reported to Krieg as regional sales vice president. As general manager, Bates wrote several letters to Krieg complaining about the quality and timeliness of the company's accounting procedures. Bates resiged in 1974, just before Krieg relinquished the

sales vice presidency to become the general manager in Charlotte. Stoughton subsequently appointed Bates to succeed Krieg as regional vice president. Krieg maintains these events support an inference that young general managers who complained got promoted, but old general managers who did so got fired.

This single incident differed too much to permit such an inference. There is no evidence whatsoever that Bates resigned becuase he was disgruntled or disillusioned with the company, as Krieg contends. Nor is there any evidence that Bates had threatened to leave and use his knowledge of the region to benefit a competitor. There is a qualitative difference between Bates's acts of writing letters to his superior to complain about internal accounting procedures and Krieg's statements that the company was "backwards," "cheap," and had an

"inferior product."

Plaintiff's second argument is that the statistical evidence supports an inference that the company had a policy of terminating older employees. The ADEA applies to people 40 years of age and over. 29 U.S.C.A. §631. The percentage of all general managers terminated who wre over the age of 40 compared to the percentages of those terminated who were under 40 were as follows:

Year	% of General Manger 40 & over	% of all General Managers Terminated who were 40 & over
1975	70.2%	53.8%
1976	68.7%	60%
1977	67.6%	55.5%
1978	70.1%	66.6%

% of General Managers under 40	% of all General Managers Terminated who were under 40
29.8%	46.2%
31.3%	40%
32.4%	44.5%
29.9%	33.4%

Plaintiff's argument based on those statistics fails for two reasons. First, the statistics themselves are insufficient to support the argument. It is not significant that a majority of the general managers terminated were in the protected age group, because that group comprised the majority of all general managers employed by the company. Rather, the significant fact is that the percentage of terminated general managers who were over 40 was less than the percentage of general managers in that age group employed by the company. See Pace v. Southern Railway System, 701 F.2d 1383 1388-89 (11th Cir. 1983). Furthermore, there is nothing in the record to indicate

whether the company replaced those over 40 with managers outside of the protected age range. The fact that in 13 years only five general managers reached the normal retirement age of 65 has no evidentiary value. The plaintiff conceded that turnover among general managers was high. There is no evidence as to how many general managers voluntarily resigned, took early retirement, stayed with the company or returned to straight sales, or died prior to reaching the normal retirement age.

The second reason the statistics cannot carry plaintiff's burden is that they do not negate the reasons given by the company for Kriig's discharge. Even if the statistics did show that the company sometimes discriminates because of age, which is the best they could show because some general managers in the protected age group were not discharged, they do not show that the

company did so in this instance.

Finally, Plaintiff argues that the company treated him differently than other general managers who resiged to return to straight sales work because it sought to impose on him a monthly production requirement of $400 while the monthly requirement for others ranged from none to $150. Without going into unnecessary detail about each general manager mentioned, the evidence established that the differences in the amount of required production varied from person to person based on several factors. These included the value of their general manager's contract based on "commission overrides," and whether the person was disabled, held an "old" or "new" manager's contract, or returned to straight sales or had other supervisory duties. One resigning general manager who was over 40 had a monthly production requirement of $750

almost twice that proposed to plaintiff. While the differences in production requirements may be attributable to various factors, they do not support an inference they are attributable to age.

In this case, the district court properly determined that the evidence was insufficent to support an inference of discrimination. The jury's verdict was properly set aside.

AFFIRMED.

KRAVITCH, Circuit Judge, dissenting.

I respectfully dissent. The majority states: "In this case, the issue is whether there is sufficient evidence to support the jury's verdict that plaintiff carried the burden of showing that the company's proffered reasons for the discharge were merely a pretext for firing Krieg because of his age." Maj.Op. slip op. at 359, at____.

Proof of mere pretext however is not

the only way in which plaintiff can carry "the ultimate burden of persuading the court that [he] has been the victim of intentional discrimination." Texas Department of Community Affairs v. Burdine,450 U.S. at 256, 101 S.Ct. at 1095. This indirect route may be taken, but plaintiff may also proceed "directly by persuading the court that a discriminatory reason more likely motivated the employer..." Id. Once this is recognized one half of the majority's analysis unraveis. The majority explains why the evidence proffered by Krieg does not "negate" defendant's proffered reasons but fails to address why "reasonable" persons could not conclude that discrimination way the more likely motive.

The other half of the analysis collapses because while quoting Boeing v. Shipman Co., 411 F.2d 365, 374 (5th Cir.1969) (en banc) and giving reasons why

the evidence proffered by Krieg would not have warranted a directed verdict in his favor, the majority fails to show why the evidence was inadequate to permit the jury to infer discrimination. See Id.

First, that the form of Bates' complaints were qualitatively different from Krieg's complaints does not preclude "reasonable men," Boeing v. Shipman Co., 411 F.2d at 374, from concluding that discrimination rather than qualitative difference was the basis for the disparate treatment. Given the defendant's evident eagerness to seize the opportunity to terminate Krieg the jury reasonably could have concluded that "a discriminatory reason more likely motivated the employer..." Texas Department of Community Affairs v. Burdine, supra.

Second, in my view it cannot be said that the fact that in 13 years only five

general managers reached the normal retirement age has no evidentiary value. Maj.Op. slip op. at 360, at _____. I would agree that such general evidence would not have justified a directed verdict for Krieg and by itself may not have been sufficient to preclude a directed verdict in the defendant's favor, but such an unrebutted, unexplained fact, in conjunction with the other evidence presented, has some probative value. Further, while I agree that here the statistics proffered by plaintiff do not support an inference of discrimination, I would analyze the statistics differently. In Pace v. Southern Railway System, 701 F.2d 1383 (11th Cir.1983) which the majority cites to support its analysis, we held that an inference of discrimination necessary to create a prima facie case based on statistical evidence was not established. In so doing we noted that the relevant

statistical comparison for these purposes was of the percentage of workers in the protected category who were promoted, here terminated, in the relevant time period to the percentage of workers in the nonprotected category who were promoted/ terminated in the same period. Id. at 1388-89. Extrapolating from the statistics plaintiff has provided here and which are cited in part in the majority opinion, in 1978 approximately 30.43% of those under age 40 were terminated while only approximately 25.92% of the general managers in the protected category were terminated. In 1977, 52.17% of general managers under 40 were terminated while only 31.25% of those in the protected group were terminated. In 1976, approximately 30.76% of general managers outside the protected group were terminatd while appoximately 21.05% of those 40 and over were released. In 1975, 24% of

those under 40 and only 11.86% of those in the protected group were terminated. Based upon that four-year period, an average of 34.34% of the managers under age 40 were terminated annually while an average of only 22.47% of the managers in the protected group were terminated annually. Where a consistently smaller percentage of the protected group was terminated than of the non-protected group, no possible inference of age-based discrimination can be drawn from the statistics. Thus, while disagreeing with the majority's analysis, I agree with the conclusion that the statistics do not support an inference of discrimination.

Third, however, I am at a loss as to why the evidence concerning the high production requirement does not allow an inference of discrimination. The majority concludes that the differences are attributable to "various factors" but

rejects the possibility that one of those factors may have been intentional discrimination. While the majority and the district court may not have inferred discrimination from this evidence if they were on the jury, I disagree that such an inference was beyond the realm of the reasonable. Indeed the example cited by the majority of one resigning general manager also over age 40 who was given an even higher production requirement that Krieg supports an inference that Krieg and others in the protected group were being pushed out by the company.

Finally, it may be that had I been a juror in this I would have concluded that Krieg was terminated because he was causing trouble and was unable to produce adequately. There is substantial evidence however that the company used Krieg's criticisms and anger as a way to push him,

an employee in the protected age category making a relatively large salary, out of the way for younger, less expensive employees. I cannot join the majority's determination that this was not a reasonable conclusion. Our role is not to second-guess the jury's evaluation as long as "reasonable" persons could differ. This is admittedly a close case, which is precisely the reason the jury's verdict must be respected if the evidence permits an inference of discrimination. Boeing v. Shipman Co. 411 F.2d at 374. I would reverse the grant of judgment notwithstanding the verdict and order the jury verdict for the plaintiff reinstated.

Office - Supreme Court, U.S.
FILED
MAR 9 1984
ALEXANDER L. STEVAS
CLERK

No. 83-1383

In the Supreme Court of the United States

OCTOBER TERM, 1983

MARK K. KRIEG,

Petitioner,

vs.

THE PAUL REVERE LIFE INSURANCE COMPANY,

Respondent.

BRIEF FOR RESPONDENT THE PAUL REVERE LIFE INSURANCE COMPANY IN OPPOSITION

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QUESTION PRESENTED

Did the Eleventh Circuit's review of the entire evidentiary record on review of the judgment n.o.v. reflect a serious, material conflict between the circuits, especially relevant to ADEA cases, warranting the exercise of this Court's supervisory powers?

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In the
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BRIEF FOR RESPONDENT THE PAUL REVERE LIFE INSURANCE COMPANY IN OPPOSITION

OPINIONS BELOW

Respondent accepts the petitioner's statement of the opinions below but adds that the opinion of the Court of Appeals has been reported at 718 F.2d 998.

JURISDICTION

Respondent accepts the petitioner's statement of jurisdiction.

STATUTORY PROVISIONS AND RULES INVOLVED

Respondent accepts petitioner's statement of the statutory provisions and rules involved.

STATEMENT OF THE CASE

Respondent adopts the statement of the case set forth by the Court of Appeals below at 718 F.2d 998, 999-1001, rather than that of the petitioner.

Upon review, the Court of Appeals held that petitioner had failed to present sufficient evidence to support the jury's verdict that respondent's proffered reasons for his termination were pretextual, and affirmed the trial court's grant of judgment notwithstanding the verdict.

ARGUMENT

1. THE COURT OF APPEALS PROPERLY REVIEWED THE ENTIRE EVIDENTIARY RECORD

Petitioner's inference at page 7 of his petition that the Court of Appeals impermissibly reviewed the evidentiary record as to the events leading up to his termination is untenable. It is well established that a court of appeals is to apply the same test as the district court in reviewing the grant or denial of a judgment n.o.v. Therefore, it must review the entire evidentiary record to determine whether the evidence was sufficient to allow a reasonable juror to arrive at the verdict rendered. During such review the court of appeals owes no particular deference to the trial court's determination. *Boeing Co.* v. *Shipman*, 411 F.2d 365, 374 (5th Cir. 1969); *Schwimmer* v. *Sony Corp. of America*, 677 F.2d 946, 951-952 (2nd Cir. 1982) *cert. den.*, ... U.S. ....., 103 S.Ct. 362 (1982) *reh. den.*, ... U.S. ....., 103 S.Ct. 840 (1983); *Bohrer* v. *Hanes Corp.*, 715 F.2d 213, 219 (5th Cir. 1983). There was nothing "curious" (as petitioner put it) about the Court of Appeals' extensive review of the evidence presented in this case. Moreover, the evidence cited and relied upon by the Court of Appeals was essentially undisputed, as the Court expressly recognized at 718 F.2d 998, 1001.

In the absence of substantial factual disputes, the Court of Appeals had no occasion to delve into credibility matters and did not enter impermissible findings which implicated witness credibility merely because oral as well as documentary evidence was recited.

2. THE CONFLICT BETWEEN THE CIRCUITS IMPLICATES NO SERIOUS ISSUE OF LAW

Petitioner's primary contention as to why this Court should grant a writ of certiorari derives from the claim that a conflict exists between the circuits as to the measure of evidence to be reviewed by a court entertaining a judgment n.o.v. motion. Relying heavily upon Justice White's lone dissent from the denial of a writ of certiorari in *Schwimmer, supra,* petitioner contends that the "all of the evidence" measure expressly adopted by the Second, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, Eleventh, and District of Columbia Circuits is in conflict with separate standards adopted by the First and Third Circuits, and by the Eighth Circuit. Notwithstanding Justice White's dissent, commentators would agree with Professor Moore who, in his treatise, wrote as to this apparent conflict:

> "The judicial authorities on the question of proper standards for directing a verdict would seem to be pretty much in accord. The language utilized remains diverse and, occasionally, troublesome. Fn. 33. [Note omitted]. Essentially, what the cases reveal is not a difficulty of ascertaining a proper standard, but a difficulty in applying the standard to the varying facts of the individual cases". 5A Moore and Lucas, *Moore's Federal Practice,* ¶50.02[1], p. 50-39 (2d Ed. 1982).

Clearly, Professor Moore views this problem as one involving the application of law to the particular facts, not as one implicating serious disputes between the circuits as a matter of law. Apparently, given this Court's refusal to grant certiorari in *Schwimmer, supra,* it agrees with the view that this conflict, such as it is, is not so compelling as to require the Court's issuance of a writ of certiorari.

3. EVEN IF A SERIOUS CONFLICT EXISTS, THE MATERIALITY OF THE ISSUE TO THIS CASE IS NIL

Even were this Court to determine that a conflict serious enough to warrant issuance of a writ of certiorari existed involving the measure of evidence to be considered in reviewing a judgment n.o.v., the instant case is not the one in which this dispute could best be resolved.

First, it should be noted that even the petitioner concedes (petition, p. 33) that the "all of the evidence" measure of reviewable evidence, adopted by the Fifth Circuit in *Boeing, supra,* and the Eleventh Circuit in *Neff* v. *Kehoe,* 708 F.2d 639 (11th Cir. 1983), was properly applied in the instant case.

Even more importantly, the petitioner makes no reference to any evidence, whether in the form of oral testimony or documentary evidence, which was wrongly considered (or wrongly not considered) by the Eleventh Circuit due to its reliance upon the "all of the evidence" standard. Nowhere in his petition are particular facts set forth the consideration of which, if the First, Third or Eighth Circuit standards were applied, would mandate reinstitution of the jury's verdict. Nor does the petitioner suggest which of the purportedly conflicting tests utilized in the First, Third or Eighth Circuits should be applied to the case at bar. Petitioner has seized upon this issue as a means by which to catch this Court's attention, without demonstrating its materiality to this case. Whether or not the Court were disposed to resolving this purported conflict, there is no indication that the same result would not occur in this case even if another standard were applied. Hence, this is not the case by which this Court could best resolve this conflict.

In reality, petitioner's dispute with the court of appeals' decision does not emanate from the measure of review applied, but from the fact that the Court of Appeals correctly found that there was no evidence to support the jury's verdict.

4. PETITIONER'S ARGUMENT WOULD INSULATE ALMOST ALL ADEA PLAINTIFFS FROM DISMISSAL FOR LACK OF EVIDENCE AND WOULD SHIFT IMPERMISSIBLY THE BURDEN OF PERSUASION

In an attempt to create the impression that the issue presented has particular import for ADEA cases, petitioner cites the Eighth Circuit's decision in *Dace* v. *ACF Industries,* 722 F.2d 374 (8th Cir. 1983). There, in a *dictum* at note 7 on page 377, the Court queried whether respect for the jury's role as fact finder requires a court to maintain the presumption of discrimination established by the *prima facie* case. However, the Court did not have to inquire further since the case was remanded because the trial court had directed a verdict for the defendant at the close of defendant's case without allowing the plaintiff to present rebuttal testimony, even though an offer of proof was made. Furthermore, the court of appeals in *Dace* cited critical testimony on issues which the Eighth Circuit has found, as a matter of law, raise an inference of age discrimination—which would mean, in turn, that only by making inappropriate appellate credibility determinations could a directed verdict be upheld.

Much closer to the instant matter is the Fifth Circuit's holding in *Bohrer, supra,* in which a judgment n.o.v. for defendant in an ADEA case was affirmed. There, the evidentiary record was carefully reviewed and any inferences raised by plaintiff were found to have been "dissi-

pated by the defendant's proffered justification." 715 F.2d at 219. The Court found, consistent with this court's decision in *Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 248, 101 S.Ct. 1089 (1981), that once the defendant articulates reasons for the dismissal, the plaintiff bears the burden of production merging with the ultimate burden of persuasion.

The petitioner's suggestion that ADEA cases should be treated differently for judgment n.o.v. purposes is unconvincing. Requiring that inferences raised by the establishment of a *prima facie* case should remain even after legitimate reasons are articulated by the defendant would insulate every ADEA plaintiff from dismissal by directed verdict or judgment n.o.v. so long as the "not onerous" (*Burdine, supra*, 450 U.S. at 253, 101 S.Ct. at 1094) burden of making out a prima case were met. Further, petitioner's approach would impermissibly shift the burden of persuasion since if any inference of discrimination were to survive defendant's articulation of legitimate reasons for its conduct, a plaintiff would be relieved of the burden of persuading the trier of fact that the defendant's proffered reasons were pretextual. The ultimate burden of persuasion must always remain with the plaintiff in a discrimination suit. *Board of Trustees of Keene State College* v. *Sweeney*, 439 U.S. 24, 25, n. 2, 99 S.Ct. 295, 296, n. 2 (1978); *Burdine, supra*, 450 U.S. at 253, 101 S.Ct. at 1093.

5. PETITIONER'S INVOCATION OF THIS COURT'S SUPERVISORY POWERS IS UNPERSUASIVE

Petitioner's *pro forma* attempt to invoke the supervisory power of this Court pursuant to Rule 17, paragraph 1(a), of the Rules of Practice is unavailing. Petitioner suggests that the Court of Appeals' ruling "has so far departed from the accepted and usual course of judicial proceedings,

or so far sanctioned such a departure by a lower court. . ." (Rule 17(1)(a)), that this Court's supervision should be exercised. But in the face of the rule's stringent standard, petitioner can do nothing more than make the bare allegation that "the court ignored the effect of cross-examination on the credibility of the defendant's witnesses. . ." (petition, p. 33). Petitioner makes no particularized reference to the manner in which the Court of Appeals purportedly ignored cross-examination or the impact of this purported omission upon the decision to affirm. To the contrary, the Court of Appeals explicitly indicated that the testimony upon which it relied was not in "substantial dispute" (*Krieg, supra,* at 1001), thereby rendering credibility findings unnecessary.

As to the Court of Appeals' finding of a lack of evidence sufficient to raise an inference of discrimination, (*Krieg, supra,* at 1001-1002), credibility determinations played no part. On each of the three points which petitioner sees as pretextual motives of defendant, the Court found no inference of discrimination could reasonably have been derived and did so without crediting any one account over another. Nothing in the petition demonstrates otherwise. There simply was no evidence of discriminatory purpose or pretext presented by the petitioner and both the trial court and the Court of Appeals recognized that fact.

Finally, as even the petitioner concedes, the use of the "all of the evidence" measure by the Court of Appeals in this case was fully appropriate given the Eleventh Circuit's adoption of that standard in *Neff, supra.* (petition, p. 32). Applying that standard the Court of Appeals affirmed the trial court's grant of judgment n.o.v. It is difficult to believe that either the trial court or the Court of Appeals "deviated greatly from that standard" given petitioner's failure to set forth any examples of such deviation and the Court's invocation of the proper formula.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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